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No. 99-5525

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHARLES THOMAS DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Court-Appointed *Amicus Curiae* ("*amicus*") presents four arguments in defense of 18 U.S.C. § 3501, each of which is untenable. *First*, *amicus* contends that § 3501 is constitutional because *Miranda*'s core holdings exist in a heretofore unknown realm of "constitutional common law" rulings by this Court, subject to Congressional overruling, but nonetheless applicable to the States. *Amicus* Br. 4. Having erroneously denied that *Miranda*'s requirements are "constitutional standards for protection of the privilege," *Miranda* v. *Arizona*, 384 U.S. 436, 491 (1966), *amicus* stretches for support from areas such as the dormant Commerce Clause and *Bivens* actions. None of these, however, creates the hybrid species of constitutional common law that *amicus* suggests.

Second, amicus points to this Court's post-*Miranda* jurisprudence as having stripped *Miranda* of constitutional status. That this Court has recognized a public safety exception, for example, no more undermines *Miranda*'s core holdings than a "clear and present danger" exception undermines First Amendment freedoms. *Third, amicus* half-heartedly contends that even if *Miranda*'s requirements are constitutional and cannot be dislodged by Congress, § 3501 satisfies *Miranda*'s requirements. This is patently false. Rather than require the minimum threshold information essential to dispel interrogation's compelling pressures and provide for a knowing and intelligent waiver of the privilege, § 3501 reverts to an amorphous due process totality of the circumstances voluntariness test.

Finally, amicus contends that if *Miranda* is a constitutional ruling and § 3501 does not meet *Miranda*'s requirements, the Court should overrule *Miranda* and adopt § 3501's test of "voluntariness" based on the totality of the circumstances. Thus, *amicus* would have the Court reject a prominent 33-year-old precedent that is workable, the foundation of numerous subsequent doctrinal developments, widely relied on by

the public, police and criminal justice system, not shown to be unsound in principle and not undermined by any subsequent change in its factual premises.

ARGUMENT

1. The bulk of *amicus*' brief is spent unsuccessfully attempting to resolve *amicus*' self-made conundrum: demonstrating how *Miranda*'s core requirements could be "non-constitutional" and hence voidable at Congress' pleasure, yet sufficiently constitutional to reverse State court criminal convictions. See *Amicus* Br. 4-28. Having taken petitioner to task for supposedly failing to offer a "reconciling theory" of the disparate strands of this Court's Fifth Amendment jurisprudence, *amicus* proffers a theory that places into doubt the nature of every decision of this Court interpreting any provision of the Bill of Rights and that authorizes this Court to adopt rules that preempt state law, even though they are wholly untethered to the Constitution.[1]

Amicus' theory is unsound for a number of additional reasons. First, *Miranda*'s express language demonstrates that its requirements are constitutional in nature. See Pet. Br. 13-20. Second, *Miranda*'s underlying reasoning does as well. The Court expressly held that the privilege provides greater pro-

[1] For example, every argument made by *amicus* could be asserted with equal force against the reasonable doubt standard. *See In re Winship*, 397 U.S. 358, 364 (1970) (State must prove all statutory elements of an offense beyond a reasonable doubt and that burden does not shift); *Mullaney* v. *Wilbur*, 421 U.S. 684, 702 (1975) (same). *Patterson* v. *New York*, 432 U.S. 197 (1977) (same). Nothing in the Constitution's text requires it; it certainly creates a presumption of innocence that is unwarranted perhaps in the vast majority of indictments, and probably most jurisdictions would continue to follow it even if the Court were to abandon it.

tection, *i.e.*, the right to be free of pressures which discourage silence and thereby render the decision to incriminate oneself less than "truly the product of free choice," *Miranda*, 384 U.S. at 457; *id.* at 458 (same), than the Due Process Clause prohibition on "coercion," *i.e.*, blatant physical coercion or psychological ploys that actually "overbear" the will of an accused, forcing the suspect to confess.

To "permit a full opportunity to exercise the privilege" and to "combat" custodial interrogation's "inherently compelling pressures," the Court announced its core holding that the "accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Id.* at 467. The Court made abundantly clear that the rules it announced were "*constitutional* standards for the protection of the privilege." *Id.* at 491 (emphasis added).

To be sure, *Miranda* also requires law enforcement officials to abide by the specific *Miranda* warning formulations, while inviting both levels of government to develop alternative safeguards. *Id.* at 444-45, 467, 479. But that is not all that *Miranda* held, and *Miranda*'s additional holdings doom § 3501. First, the Court explicitly reserved to itself the authority to determine whether those alternative safeguards are "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Id.* at 467. As explained below, § 3501 does not meet that standard. Second, and more fundamentally, the *Miranda* Court, apart from announcing specific rules, also set forth a core holding — which it never invited the federal or state governments to supplant (nor could it under our constitutional system) — that government must provide "fully effective means . . . to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it." *Id.* at 444. Section 3501 does not satisfy that core require-

ment, because, among other things, it does not *require* that defendants be informed of their rights in advance.

Amicus' constitutional common law theory could come to the aid of § 3501 only if the theory establishes that *Miranda* falls within a category of judicial rulings where Congress, not the Court, has the authority (i) to determine that alternatives to *Miranda*'s specific rules pass muster, or (ii) to override *Miranda*'s core holding. But there is no such species of constitutional common law that permits Congress to make such judgments or to override core constitutional holdings. If there were, it would eviscerate the right of judicial review articulated under *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 173-80 (1803), and affirmed under far more serious assaults. See, *e.g.*, *Cooper* v. *Aaron*, 358 U.S. 1, 17-20 (1958); *United States* v. *Nixon*, 418 U.S. 683, 703, 705 (1974); *City of Boerne* v. *Flores*, 521 U.S. 507, 535-36 (1997). Thus, it comes as no surprise that the materials cited by *amicus* fail to establish such a category of law or that *Miranda* falls within such a hybrid class.

Amicus' repeated invocations of the line of cases running from *Anders* v. *California*, 386 U.S. 738 (1967), to *Smith* v. *Robbins*, 120 S. Ct. 746 (2000), are unavailing. See *Amicus* Br. 4, 11, 12. In *Anders*, the Court outlined procedures governing the withdrawal of appellate counsel that satisfy constitutional requirements. *Anders*, 386 U.S. at 744. In *Robbins*, the Court simply affirmed that the States are free to develop different procedures, provided that their alternative "procedures adequately safeguard a defendant's right to appellate counsel." 120 S. Ct. at 753; see *id.* at 756-67. The Court did not suggest that Congress itself had the ability to determine whether the alternatives were equally effective. Quite the contrary, the Court made that decision itself. Nor did the

Court suggest that Congress had the power to overrule a core holding similar to that set forth in *Miranda*.

Amicus goes even further afield when it turns to the line of cases stemming from *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). See *Amicus* Br. 3, 11-14, 16-17, 20. Whatever else *Bivens* is, it is not an example of constitutional common law that is sufficiently constitutional that it can apply to States, but insufficiently constitutional that it can be supplanted by Congress. First, post-*Bivens* decisions have made clear that *Bivens* was based principally on an interpretation of the statute conferring federal-question jurisdiction. See *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983); *Schweiker* v. *Chilicky*, 487 U.S. 412, 420-21 (1988). As a case of statutory interpretation, *Bivens* has nothing to say about Congress' ability to dislodge the Court's interpretation of the Constitution. Second, in *Bivens*, the Court announced the existence of a cause of action against *federal* officials alone. *Bivens*, 403 U.S. at 389, 394. Thus, *Bivens* in no way speaks to the question of the extent to which a judicial ruling like *Miranda*, which applies to *both* federal *and state* officials, see *Miranda*, 384 U.S. at 456-57, 463-64, is, or is not, "constitutional" in nature. See also *Bivens*, 403 U.S. at 408 n.8 (Harlan, J., concurring) (the Court's ability to provide for "special prophylactic measures" "has little, if indeed any bearing" on whether the judiciary could authorize a monetary damages remedy).

The Court's dormant Commerce Clause jurisprudence, see *Amicus* Br. 18 n.11, is also unavailing. The Court's action in striking down a state activity under the dormant Commerce Clause is based upon the Court's purely constitutional determination that Congress, not the States, should exercise a particular type of power over interstate commerce which preserves the status quo of an open national market commanded by the Constitution unless Congress declares otherwise. If

Congress later acts to permit the States to undertake the prohibited activity, it is not overriding the Court, but merely acting in the field that the Constitution has preserved for it. Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 Harv. L. Rev. 1117, 1138-41 (1978). Furthermore, the Framers granted Congress plenary authority to enforce the Commerce Clause, but they gave Congress no similar authority to define the scope of the Bill of Rights. The dormant Commerce Clause is specifically intended to restrain States in favor of the national government. It therefore cannot inform the Court's judgment about rules that apply to decisions under the Bill of Rights, which was enacted to restrain the federal government in favor of the States and individuals.

Amicus' reliance on act of state doctrine cases, *Amicus* Br. 17-18, is similarly misplaced, for in those cases the Court developed a doctrine of federal common law to preserve the power of Congress and the National Executive to act in an area "intrinsically federal," *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 (1964), similar to other areas where there exist "considerations supporting exclusion of state authority." *Id.* The act of state doctrine cases therefore do not provide a rationale for *Miranda*'s application in State court criminal proceedings, an area primarily of State concern. See Schrock & Welsh, *supra* at 1133-34. In addition, the fact that Congress later acted in this area by authorizing courts to ignore certain foreign state acts in limited circumstances, see *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166, 181 (2d Cir. 1967), did not constitute a reversal of the Court, but, rather, Congress acting in the field preserved for it.[2]

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[2] Finally, even the apparent source of *amicus'* constitutional common law theory—Monaghan's article *Foreword: Common Law*, 89 Harv. L. Rev. 1 (1975), *see Amicus* Br. 10 n.7—does not support *amicus'* position. It does not suggest that Congress has the power to overrule *Miranda*'s

2. *Amicus* argues that the Court's subsequent decisions demonstrate that the "Constitution does not require *Miranda* warnings." *Amicus* Br. 7. This is neither surprising nor particularly relevant. As noted above, *Miranda* itself held that its specific formulation of the warnings is not required. *Amicus'* claim would have force if this Court's subsequent decisions demonstrated that the Court had rejected *Miranda*'s core holding that some procedures "at least as effective in apprising accused persons of their right[s]" are required. *Miranda*, 384 U.S. at 467. The Court has never so held, but has instead reaffirmed that core holding in a number of subsequent cases. See, *e.g.*, *Oregon* v. *Elstad*, 470 U.S. 298, 317 (1985) ("[t]he Court today in no way retreats from the bright-line rule of *Miranda*").

Amicus nonetheless argues that the core holding is "not good law," *Amicus* Br. 38, because the Court has retreated from *Miranda* and held that the privilege requires no more than traditional due process analysis. To the contrary, the Court has continued to uphold suppression of unwarned statements in the prosecution's case in chief even where the statements were not "involuntary" under a totality of circumstances test. See, *e.g.*, *Edwards* v. *Arizona*, 451 U.S. 477, 483 (1981) (excluding statement trial court found "to have been 'voluntary'"); *Harris* v. *New York*, 401 U.S. 222, 224

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core holding. Indeed, the article argues that "true constitutional rules," which cannot be overridden in any manner by mere legislation, are those that are clearly "related to the core policies underlying the constitutional provision." *Id.* at 33. By that measure, *Miranda*'s core holding surely is a "true constitutional rule[]." The article goes even further in acknowledging that is may be "a constitutional requirement that police interrogation be consonant with *specified rules*," *id.* at 33 (emphasis added), and concludes that a "prophylactic rule might be constitutionally required when it is necessary to overprotect a constitutional right." *Id.* at 20.

(1971) (statements suppressed in case in chief although there was no claim that statements were "coerced or involuntary").

Furthermore, concern regarding intelligent waiver continues to be reflected in the Court's opinions. See, *e.g.*, *Davis* v. *United States*, 512 U.S. 452, 458 (1994) (right to counsel "is sufficiently important . . . that it 'requir[es] the special protection of the knowing and intelligent waiver standard' ") (alteration in original) (quoting *Edwards*, 451 U.S. at 483); *Elstad*, 470 U.S. at 314 ("suspect made a rational and intelligent choice whether to waive or invoke his rights").

The substantially broader protection afforded by the privilege than the Due Process Clause is also reflected in the fact that the privilege prohibits admission of confessions extracted under threat of a court's contempt powers,[3] an employment discharge,[4] or subsequent use of a defendant's silence as evidence of guilt,[5] despite the fact that none of these pressures or influences actually breaks the accused's will. See also Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435, 440-46 (1987) (discussing distinction between Fifth Amendment "compulsion" and Due Process Clause "coercion"). Moreover, the Court's recognition of the privilege's broad protection is longstanding. In *Bram* v. *United States*, 168 U.S. 532 (1897), the Court held that the interrogator's statement: " 'If you had an accomplice, you should say so, and not have the blame for this horrible crime on your own shoulders,' " *id.* at 539, violated the privilege. *Id.* at 565. The Court concluded that " 'the law cannot measure the force of the influence used or decide upon its effect upon the mind of the prisoner, and,

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[3] *See Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 79-80 (1964).

[4] *See Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806-09 (1977).

[5] *See Mitchell* v. *United States*, 526 U.S. 314, 328-29 (1999); *Griffin* v. *California*, 380 U.S. 609, 614-15 (1965).

therefore, excludes the declaration *if any degree of influence has been exerted.*' " *Id.* (emphasis added) (quoting Russell, *Treatise on Crimes and Misdemeanors* 479 (6th ed. 1896)). Similarly, the Court held in *Miranda* that *post hoc* analyses of the record for "overt physical coercion or patent psychological ploys" are ineffective in determining whether the privilege's requirement of a truly "free choice" has been met, 384 U.S. at 457, and further held that contemporaneous warnings are "indispensable" to dispel interrogation's "pressures." *Id.* at 469.

Amicus claims that three of the Court's subsequent cases "rest directly on *Miranda*'s non-constitutional status," *Amicus* Br. 8 (citing *Harris*, 401 U.S. at 224, *Oregon* v. *Hass*, 420 U.S. 714, 722 (1975), and *New York* v. *Quarles*, 467 U.S. 649, 654 (1984)). Yet none of the three does so. In *Harris*, the Court held that incompletely warned statements, although not admissible in the case in chief, could be introduced for the limited purpose of impeachment. In reaching this conclusion, the Court reasoned that while " 'the Government cannot make an affirmative use of evidence unlawfully obtained[,] [i]t is quite another [thing] to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.' " *Harris*, 401 U.S. at 224 (quoting *4* v. *United States*, 347 U.S. 62, 65 (1954)). Thus, *Harris*'s rationale is consistent with the view that the statements were obtained by an "illegal method," *i.e.*, without the constitutionally required procedures found necessary by the Court to secure the privilege. *Hass* was similarly based on the principle that "inadmissibility [for impeachment] would pervert the constitutional right into a right to falsify free from the embarrassment of impeachment evidence." 420 U.S. at 723. Here, again, the Court accepted that the accused has a "constitutional right" that may have

been violated. *Harris* and *Hass* therefore hardly prove that *Miranda's* requirements are "non-constitutional."

Amicus places great reliance on a footnote in *Quarles*: "absent actual coercion by the officer, there is no constitutional imperative requiring the exclusion of the evidence that results from police inquiry of this kind; and we do not believe that the doctrinal underpinnings of *Miranda* require us to exclude the evidence." 467 U.S. at 658 n.7. *Amicus* interprets this footnote as a holding that the privilege is not violated when pressures are placed on an accused to confess that are short of actual coercive actions that break the defendant's will, *i.e.*, that no substantive difference resulted from *Miranda*'s recognition that the privilege, in addition to the Due Process Clause, applies. There is no reason to ascribe such a broad holding to the *Quarles* footnote, nor does every public safety exception work a modification to the right or privilege at issue. This kind of limit on a constitutional right has been recognized even in the First Amendment context where the language seems much more plainly aimed at limiting governmental intrusion. Thus, not withstanding the phrase, "Congress shall make no law abridging freedom of speech," U.S. Const. amend. I, the Court has long recognized that "clear and present danger" is an essential limit on the right. See *Schenck* v. *United States*, 249 U.S. 47, 52 (1919); *Brandenberg* v. *Ohio*, 395 U.S. 444, 447 (1969). *Quarles* is much better understood as following that same basic approach to constitutional interpretation.

The heart of *amicus*' claim that *Miranda*'s requirements are non-constitutional is *amicus*' belief that a judicially devised protection for a constitutional right that sweeps more broadly than the right is non-constitutional and subject to modification by Congress, so long as Congress' scheme "honors" what the Constitution requires. *Amicus* Br. 4. Ac-

cording to *amicus*, Congress may dislodge a Court ruling that " 'overprotects a constitutional right' " and do what Congress "thinks wisest." *Id.* at 12. The problems with *amicus*' position are numerous.

First, as demonstrated in petitioner's brief at 25-27, the Court's constitutional jurisprudence is replete with prophylactic protections that sweep more broadly than the underlying right. In addition to creating "prophylactic *constitutional* rules," *Michigan* v. *Payne*, 412 U.S. 47, 53 (1973) (emphasis added), regarding criminal procedure, see Pet. Br. 26-27 (discussing cases), the Court has devised prophylactic rules regarding, for example, takings violations, see *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-37 (1982), and abridgment of freedom of speech, see *Gooding* v. *Wilson*, 405 U.S. 518 (1972) (presuming violation of freedom of speech from mere possibility of statutes deterring speech). See Schulhofer, *supra* at 448-49 (discussing "pervasive" nature of prophylactic constitutional rules); Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190 (1988). *Amicus* simply ignores these problems.

Second, the Court has justified its creation of prophylactic rules protecting underlying constitutional rights as necessary given limits on courts' interpretive powers and other circumstances confronting courts. Thus, in *Loretto*, the Court explained that to "avoid[] otherwise difficult line-drawing problems" and adopt a test with "relatively few problems of proof," a permanent physical occupation would be deemed a per se taking. 458 U.S. at 436-37. In *Minnick*, the Court defended the rule adopted in *Edwards* that once an accused requests counsel, officials may not reinitiate questioning until counsel has been made available to him, by noting that the rule was designed to prevent police from badgering a defendant into waiving previously asserted *Miranda* rights and

"conserves judicial resources which would otherwise have been expended in making difficult determinations of voluntariness." *Minnick* v. *Mississippi*, 498 U.S. 146, 151 (1990). Similarly, the Court held in *Miranda* that any *post hoc* examination of whether the privilege had been violated would necessarily have to determine whether the accused was, despite lack of warning, aware of her rights, an inquiry which could "never be more than speculation." *Miranda*, 384 U.S. at 469. Moreover, still left to be determined was whether the accused, despite lack of warning, nonetheless knew that her particular interrogators were prepared to honor her exercise of the privilege "at that point in time." *Id.* The Court rejected such speculative *post hoc* inquiries in favor of warnings—"a clearcut fact." *Id.*

The creation of prophylactic rules thus constitutes a common and justified part of the Court's exercise of its powers to interpret the Constitution's requirements. As one commenter has noted, "it makes much more sense to read into the Constitution a general requirement that its various provisions be interpreted in light of institutional realities than to insist that these realities be ignored." Strauss, *supra* at 208; see Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 Cornell L. Rev. 101, 169 (2000) ("under any plausible approach to constitutional interpretation, courts must be allowed to take into account their fact-finding limitations"); Schulhofer, *supra* at 453.

There is thus no support in the Court's cases for *amicus*' claim that the "Court would only have authority to insist on warnings or their equivalents if the admission of a statement obtained without these measures would violate the [underlying] Constitutional [right]." *Amicus* Br. 38. *Amicus*' claim is an attack on "the ability of the Court to interpret constitutional provisions in light of institutional realities, to take into

account its own fact-finding limitations, and to utilize presumptions and prophylactic rules in order to make constitutional rights more meaningful." Kamisar, *supra* at 179.

3. *Amicus* argues in the alternative that if *Miranda* is constitutional, then § 3501 plus "the legal landscape that surrounds it," provides "more than adequate protection" against "police compulsion." *Amicus* Br. 28. *Amicus* studiously avoids arguing that § 3501 actually meets *Miranda*'s literal requirements, instead admitting that § 3501 violates *Miranda*'s core requirement that alternative procedures be "at least as effective" in apprising accused persons of their rights and assuring an opportunity to exercise them. *Id.* at 38. *Amicus* attempts to skirt this predicament with the untenable claim that this core *Miranda* holding was "not necessary to the decision." *Id.* As discussed above, this claim is untenable. See Pet. Br. 16-18.

Having admitted that § 3501 violates *Miranda*'s core requirement and can only stand if *Miranda* is overruled (or deemed already overruled *sub silentio*), *amicus* nonetheless repeatedly asserts that § 3501 "preserves the best prophylactic features of *Miranda*." *Id.* at 33. But this is patently not the case.

Miranda, for example, held that once an accused "indicates . . . . that he does not wish to be interrogated, the police may not question him," 384 U.S. at 445, a rule the Court has continued to respect. Section 3501, however, does not require exclusion of such statements. Thus, § 3501 offers far less incentive for police to honor assertions of the privilege and far less protection against use at trial of statements obtained from persons who asserted their right not to speak to police.

Miranda held that if the accused "states that he wants an attorney, the interrogation must cease until an attorney is pre-

sent." *Id.* at 474. The Court reinforced this aspect of *Miranda* in *Edwards* and *Minnick.*

Upholding § 3501 would require the Court to overrule *Minnick, Edwards* and *Miranda.* For example, statements extracted after an accused has requested, but not received, counsel by police who themselves "initiate" communication would not be required to be excluded, as *Edwards* held, but would be admissible if found "voluntary" under all the circumstances. Thus § 3501 strips away protections around the right to counsel and permits admission of statements obtained from persons who expressed their desire not to speak to police without an attorney present.

Section 3501 also dispenses with the requirement of a knowing and intelligent waiver of constitutional rights. *Miranda* specifically applied the "high standards of proof for the waiver of constitutional rights" to custodial interrogation. *Id.* at 475. The requirements of *Miranda* safeguard a fundamental trial right by protecting a defendant's Fifth amendment privilege against self-incrimination and facilitate the correct ascertainment of guilt by guarding against the use of unreliable statements at trial. See *Withrow* v. *Williams,* 507 U.S. 680, 691 (1993). Section 3501, which fails to demand a knowing and intelligent waiver of these fundamental rights, cannot possibly afford them the protection that *Miranda* and its progeny do.

The expansion of "other protective measures" does not remedy § 3501's shortcomings. *Amicus* contends that the development of civil, criminal and administrative penalties bolsters § 3501, together providing the level of constitutional protection defined in *Miranda.* Among its many flaws, this argument fails to distinguish between the need to protect exercise of individual rights and affording a remedy when such rights are violated. *Post hoc* remedies designed to address

unconstitutional acts by government actors may, at some level, act as a deterrent on police officers. However, they provide no opportunity for an accused to make a free and intelligent choice regarding whether to exercise or waive his constitutional rights during custodial interrogation. Without procedures in place to secure exercise of the privilege, "what was proclaimed in the Constitution . . . become[s] but a 'form of words' in the hands of government officials." *Miranda,* 384 U.S. at 444 (quoting *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392 (1920)).

Underlying *amicus*' claim that § 3501 provides "adequate" protection of the privilege is *amicus*' claim that the privilege "prevents the police from in any way forcing, but not causing, a confession." *Amicus* Br. 29. *Amicus* equates the privilege with the Due Process Clause's ban on police breaking or overbearing the will of the accused and "forcing" a confession. The privilege provides broader protection than does a mere prohibition on pressures so extreme as to break the accused's will. See *supra* at 7-9. Moreover, *amicus*' distinction between "forcing" and "causing" is unprincipled and unworkable. *Amicus* would return the courts to attempting to determine on a case-by-case basis how much pressure is too much pressure, see *Miranda,* 384 U.S. at 506-09 (Harlan, J., dissenting). *Miranda,* in contrast, provides an objective procedure for bracing the accused against the range of pressures to incriminate herself found in the custodial interrogation process, a procedure both more effective in protecting and more true to the nature of the privilege than § 3501's totality of the circumstances test.

In an attempt to bolster its claim that § 3501 is adequate, *amicus* attacks petitioner's "premise" as "extraconstitutional." Indeed, *amicus* unambiguously declares that "the crucial point for purposes of this case" is that "any obligation *affirmatively*

to assist a suspect is not even arguably required by the Fifth Amendment as the Framers wrote it." *Amicus* Br. 29. But this attack is made upon a straw man. *Miranda* imposes no affirmative obligation to assist; rather, it imposes an obligation to *inform* a suspect of his or her most basic constitutional rights. It is a strange conceptualization of a legal duty to inform another of material information to argue that this is gratuitous "assistance." Moreover, it is an equally strange conception of justice which finds the dissemination of information about constitutional rights to be unwarranted assistance. See *Escobedo* v. *Illinois*, 378 U.S. 478, 490 (1964) ("no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizen's abdication through unawareness of their constitutional rights").

The imposition of affirmative, *constitutional* obligations on law enforcement officers is neither novel, unduly burdensome nor inconsistent with the Constitution. For example, an accused's right to counsel also imposes a variety of obligations. See, *e.g.*, *Maine* v. *Moulton*, 474 U.S. 159, 171 (1985) ("The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek [counsel's] assistance."); *Carnley* v. *Cochran*, 369 U.S. 506, 513 (1962) ("right to be furnished counsel does not depend on a request"). Officers are required to "knock and announce" their identity when serving a warrant at a dwelling. See *Richards* v. *Wisconsin*, 520 U.S. 385, 391-95 (1997) (no blanket exception to the "knock and announce" requirement for felony drug investigations). In the course of an investigative detention or *Terry* stop, officers are required to pursue their investigation diligently. *E.g.*, *United States* v. *Sharpe*, 470 U.S. 675, 684 (1985) ("'an investigative detention must be temporary and last no longer than necessary to effectuate the purpose of the stop'") (quoting *Florida* v. *Royer*, 460 U.S. 491, 500 (1983) (plurality)).

The imposition by the Court of an affirmative obligation on officers to inform a suspect in custody of his rights is proportional under the circumstances. As a purely legal matter, custodial interrogation represents an event fraught with legal consequences, not unlike that of a guilty plea. *Miranda* quite accurately states in its famous warnings that "anything [the suspect says] can and will be used against [him] in court." 384 U.S. at 469. The Federal Rules of Evidence, for example, render immediately admissible any statement by a suspect that is in any way against his interest. See Fed. R. Evid. 804(b)(3). As *Miranda* recognized, admission of such statements in a trial represents some of the most devastating evidence available to the prosecution. 384 U.S. at 466. Accordingly, as with a guilty plea colloquy under Rule 11 of the Federal Rules of Criminal Procedure, the legal ramifications of custodial interrogation demand that the suspect be informed of each and every one of the rights that he or she waives by agreeing to make a statement to officers. Cf. *Henderson* v. *Morgan*, 426 U.S. 637, 644-45 (1976) (guilty plea is not voluntary unless defendant had " 'real notice of the true nature of the charge against him' ") (quoting *Smith* v. *O'Grady*, 312 U.S. 329, 334 (1941)). Indeed, in the guilty plea context, counsel's representations are insufficient. See *id.* at 650 (White, J., concurring); Fed. R. Crim. P. 11(c). No plea can be entered in the absence of the defendant and without the defendant's own acknowledgment that he or she is waiving a panoply of constitutional rights. See, *e.g.*, *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969). Similarly, without the *Miranda* warnings or a functional equivalent, given in advance of questioning by officers, there can be no assurance that the defendant's statements represent a voluntary and intelligent waiver of the right to avoid self-incrimination.

4. *Amicus* argues that if the Court is reluctant to allow Congress to legislate the scope of the right against compelled

testimony, then the Court should nonetheless overrule *Miranda*. Petitioner addresses the issue of *stare decisis* in his opening brief, see Pet. Br. 30-45, but, it may be important to respond to *amicus*' argument that, in spite of a number of important adjustments to the scope of *Miranda*'s rules protecting the right, the consequences of a *Miranda* violation are incongruent and disproportional. *Amicus* Br. 41-43.

Amicus again trades fast and loose on fundamentally different concepts of voluntariness. In the *amicus*' view, the absence of coercion through threat, promise or outright harm renders a statement admissible. If this is correct at all, it is only so under a due process analysis of voluntariness. This analysis emerged pre-*Miranda*, when the Fifth Amendment's right against compelled self-incrimination did not apply to the States, as a way for courts to assess whether a confession was admissible under the Fourteenth Amendment's due process standard. *Miranda*, 384 U.S. at 506 (Harlan, J., dissenting). This analysis, by its own terms, could look no further than to whether what the interrogators had done was fundamentally unfair, and its application led to some odd results. See *e.g.*, Br. *Amici Curiae* Griffin B. Bell, et al., at 21 n.18.

The due process standard of voluntariness remains relevant because it continues to play an important supporting role in criminal trial practice. A defendant whose unwarned statement has been suppressed under *Miranda* may have that statement introduced as impeachment evidence if the defendant takes the stand to testify. The Court has found the introduction of such testimony warranted to protect the integrity of trial. See *Harris*, 401 U.S. at 224; *Hass*, 420 U.S. at 723. However, in order to ensure the reliability of such testimony (again to protect the integrity of the process), the trial court determines whether the statements were voluntary under a due process test; that is, whether they were a product of coercion, threats, harm or some other activity that might affect their reliability. Using only this "due process" understanding of voluntariness, *amicus* claims that *Miranda*'s sweep is disproportionately broad because it operates to exclude statements that police did not coerce from the defendant. However, this not the standard of voluntariness proposed under *Miranda* and it is not the Court's standard for voluntariness under waiver law.

In applying the privilege to the custodial interrogation context, the *Miranda* Court embarked upon a different and more specific analysis – one in which the suspect's right not to give compelled statements and to remain silent in the face of his or her interrogators was at issue, not the broader question of the integrity of the process. In analyzing the scope of this specific right, the Court simply held that a suspect could not make a *voluntary* choice to waive rights of which he or she was unaware. *Miranda*, 384 U.S. at 468

Miranda's reach therefore is not overbroad given the scope of the privilege. It assures a voluntary and knowing waiver of the privilege. It provides clarity for law enforcement and courts alike. It shifts the burden of providing complete information about constitutional rights to the party with both the knowledge and power to do so. Indeed, given the difficulties encountered applying the totality of the circumstances test pre-*Miranda*, *Miranda's* rule is not overbroad even with respect to guarding against Due Process Clause conceptions of coercion in the interrogation process. As noted in petitioner's opening brief, while *Miranda* may sweep too broadly and too narrowly in very specific circumstances, see Pet. Br. 32; *Berkemer* v. *McCarty*, 468 U.S. 420, 433 n.20 (1984), *Miranda*'s approximate fit in both directions defeats any claim of incongruence under *Boerne*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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